PM Securities Sdn Bhd v Securities Industry Dispute Resolution Centre (Securities Commission, intervener) and another application

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NOS 25–230–11 OF 2013 AND 25–263–12 OF 2013
ASMABI MOHAMAD J
17 AUGUST 2015

Civil Procedure — Judicial review — Certiorari — Claimants brought actions before respondent for monies paid to applicant — Respondent found in favour of claimants — Whether respondent failed to explain procedure of mediation and adjudication to parties — Whether there were procedural impropriety and irrationality in respondent's findings — Rules of Court 2012 O 53

There were two applications for judicial review filed by the applicant herein pursuant to O 53 of the Rules of Court 2012 in which the applicant sought an order of certiorari to quash the decisions of the mediator and adjudicator ('M&A') of the Securities Industry Dispute Resolution Centre ('SIDREC') ('the respondent') which found in favour of the claimants ie Gan Chin Keong ('GCK') and Ng Ai Bee ('NAB'). Since the cases involving both GCK and NAB were substantially similar in terms of facts and law, the parties agreed that GCK's case would be the lead case which decision shall have the bearing on the case involving NAB. GCK's case was that, he instructed one Yew Ting Hong ('YTH'), a remisier and commissioned dealers representative ('CDR') of the applicant to purchase units of Gentings AP shares but this was never carried out by YTH. Thus, in his action taken before the M&A against the applicant, GCK claimed for recovery of monies paid by him to the applicant for the purchase of the said shares. The M&A found in favour of GCK, hence the present application by the applicant. The grounds relied upon by the applicant for the present actions were procedural impropriety and *Wednesbury* unreasonableness/irrationality on part of the respondent. For the first ground, the applicant submitted that the M&A had failed to explain to the parties the procedures or manner the mediation and adjudication process was to be proceeded with. As for the second ground, the applicant submitted that firstly, the M&A had committed an error of law by referring to only case of *Saamah Saruan v Norhisham Tahir & Ors* ('*Samaah*'s case') in determining the issue of whether YTH was acting as agent of the applicant; and secondly, the M&A had made an erroneous finding that GCK's authorisation letter did not apply.

Held, dismissing the applications with costs of RM15,000:

(1) The entire process undertaken by the M&A did not suffer from any infirmities which merit curial intervention. In fact the M&A had assiduously followed the steps stipulated by the TOR 15 of SIDREC's terms of reference ('TOR') and had adopted a fair handling of the dispute resolution between the applicant and GCK. There was no denial of the right to be heard in its true sense. Thus, the applicant's first ground of challenge premised on procedural impropriety had no merit (see paras 37–38).

(2) The M&A was entitled and indeed she was correct in referring to *Samaah*'s case. The M&A had taken into consideration all relevant factors which she was bound to follow to decide if YTH was acting as an agent of the applicant. In addition, the language in the clauses of the standard remisier's agreement ('the SRA') as a whole unambiguously and unequivocally evidenced that the SRA created an agency relationship between YTH and the applicant. With regards to the letter of authorisation, a perusal of cl 3 of the said letter would show that GCK was not obliged to indemnify the applicant since the 'loss' was caused by willful act or fraud by the applicant's agent YTH. There were no declarations made by GCK with the effect of treating YTH as his agent. In totality, the decision of the respondent did not suffer from infirmities of *Wednesbury* unreasonableness/irrationality as to warrant curial intervention. The issues decided herein would apply *mutatis mutandis* to the case involving NAB (see paras 47–48, 50, 55, 58 & 62).

[Bahasa Malaysia summary

Terdapat dua permohonan untuk semakan kehakiman difailkan oleh pemohon menurut A 53 Kaedah-Kaedah Mahkamah 2012 yang mana pemohon memohon satu perintah certiorari untuk membatalkan keputusan penimbang tara dan adjudikator ('M&A') daripada Pusat Penyelesaian Pertikaian Industri Sekuriti ('SIDREC') ('responden') yang mana berpihak kepada penuntut iaitu Gan Chin Keong ('GCK') dan Ng Ai Bee ('NAB'). Memandangkan kes melibatkan GCK dan NAB adalah sebahagian besarnya sama dari segi fakta dan undang-undang, pihak-pihak bersetuju bahawa kes GCK akan menjadi kes utama yang mana keputusan akan mempunyai pengaruh atas kes yang melibatkan NAB. Kes GCK adalah bahawa, dia telah mengarahkan seorang Yew Ting Hong ('YTH'), seorang remiser dan wakil peniaga ditauliahkan ('CDR') atas belian unit saham Genting AP tetapi ini tidak pernah dijalankan oleh YTH. Maka, tindakan ini diambil oleh M&A terhadap pemohon, GCK menuntut untuk pulangan semula wang yang dibayar olehnya kepada pemohon untuk belian saham itu. M&A berpihak kepada GCK, maka rayuan permohonan ini oleh pemohon. Alasan yang dipegang oleh pemohon untuk tindakan ini adalah ketidakwajaran prosedur dan ketidakmunasabahan/ketidakwajaran *Wednesbury* pada pihak responden. Pada alasan pertama, pemohon mengemukakan bahawa M&A gagal untuk

menerangkan kepada pihak prosedur atau tatacara proses timbang tara atau adjudikasi adalah hendak diteruskan. Untuk alasan kedua, pemohon mengemukakan bahawa pertama, M&A telah melakukan kesilapan undang-undang dengan hanya merujuk kepada kes *Saamah Saruan v Norhisham Tahir & Ors* ('kes *Saamah*') dalam menentukan isu sama ada YTH telah bertindak sebagai ejen pemohon; dan kedua, M&A membuat silap dapatan bahawa surat kuasa GCK tidak terpakai.

Diputuskan, menolak permohonan dengan kos sebanyak RM15,000:

(1) Keseluruhan proses yang dijalankan oleh M&A tidak mengalami apa-apa kelemahan yang mewajarkan campur tangan kurial. Malah M&A telah bersungguh-sungguh mengikuti langkah-langkah yang ditetapkan oleh TOR 15 rujukan terma SIDREC ('TOR') dan telah mengguna pakai pengendalian pertikaian yang saksama penyelesaian antara pemohon dan GCK. Tiada penafian hak untuk didengar dalam erti kata sebenar. Oleh itu, alasan pertama pemohon berasaskan cabaran ketidakwajaran prosedur tidak mempunyai merit (lihat perenggan 37–38).

(2) M&A berhak dan sememangnya betul dalam merujuk kepada kes *Saamah*. M&A telah mengambil kira semua faktor yang berkaitan yang mana dia terikat untuk mengikut untuk memutuskan jika YTH bertindak sebagai ejen pemohon. Tambahan lagi, bahasa dalam klausa perjanjian standard remiser ('SRA') secara keseluruhannya jelas dan tanpa ragu-ragu membuktikan bahawa SRA mencipta hubungan agensi antara YTH dan pemohon. Berkenaan surat kuasa, semakan ke atas klausa 3 surat tersebut akan menunjukkan bahawa GCK tidak diwajibkan untuk membayar ganti rugi kepada pemohon sejak 'loss' telah disebabkan oleh perbuatan sengaja atau penipuan oleh ejen pemohon YTH. Tiada deklarasi dibuat oleh GCK dengan kesan menganggap YTH sebagai ejennya. Secara keseluruhan, keputusan responden tidak mengalami apa-apa kelemahan ketidakmunasabah/ketidakwajaran *Wednesbury* untuk mewajarkan campur tangan kurial. Isu-isu yang diputuskan di sini akan terpakai *mutatis mutandis* bagi kes yang melibatkan NAB (lihat perenggan 47–48, 50, 55, 58 & 62).]

Notes

For cases on certiorari, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5584–5593.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, CA (refd)

Bursa Malaysia Securities Bhd v Gan Boon Aun [2009] 4 MLJ 695, CA (folld)

Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland [2003] 3 IR 528, SC (refd)
Chien Chung Ming v Kay Hian & Co Pte Ltd & Anor [1992] 4 CLJ Rep 366, HC (refd)
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)
Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)
Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor [2009] 6 MLJ 402, CA (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) & Anor [2015] 6 MLJ 77; [2015] 9 CLJ 179, CA (folld)
Kwikasair Industries Ltd v Sydney Stock Exchange Ltd [1968] ASLC 30 (refd)
Public Investment Bank Bhd v Yap Chee Hean [2014] 4 MLJ 857, CA (distd)
R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Saamah Saruan v Norahisham Tahir & Ors [2010] 1 LNS 1595, HC (folld)
Francis Joseph Puthucheary v Eng Securities Sdn Bhd & Anor [2012] 7 MLJ 407; [2011] 1 LNS 732, HC (refd)
Teh Seng Cheh v Kuala Lumpur City Securities Sdn Bhd (Civil Appeal No W-02–1870 of 2009) (unreported), CA (distd)
Wong Lee Choo and Public Investment Bank Berhad v Yeap Chee Hean [2014] 4 MLJ 857

Legislation referred to

Capital Markets and Services Act 2007
Capital Markets and Services (Dispute Resolution) Regulations 2010
Rules of Court 2012 O 53 r 3(2), (3)
Securities Commission Act 1993
Securities Industry Act 1983

Wong Guo Bin (Gillian Loh with him) (Izral Partners) for the applicant.
Lim Chee Wee (Sharon Chong with him) (Skrine) for the respondent.
Shanti Mogan (Shearn Delamore) for the intervener.

Asmabi Mohamad J:

INTRODUCTION

[1] There were two cases fixed for hearing before me, Case No 25–230–11 of 2013 where the claimant before the Securities Dispute Industry Resolution

Centre ('SIDREC') was Gan Chin Keong ('GCK'), and Case No 25–263–12 of 2013 where the claimant before SIDREC was Ng Ai Bee ('NAB'). A

[2] These cases were filed by PM Securities Sdn Bhd ('the applicant') under O 53(3) of the Rules of Court 2012 ('the ROC 2012') seeking for orders for certiorari to be issued to quash the decisions of mediator and adjudicator ('M&A') of SIDREC dated 7 August 2013 ('Decision (1)') and 13 September 2013 ('Decision (2)') respectively which found the claimant(s), GCK and NAB, had proven their respective claims against the applicant. B

[3] At the outset, all the respective counsels present informed the court that these cases were substantially similar in terms of facts and law, therefore parties had come to an agreement for this court to proceed with Case No 25–230–11 of 2013 as the lead case, which decision, shall have the bearing on Case No 25–263–12 of 2013. C D

CAUSE PAPERS

[4] For the purpose of Case No 25–230–11 of 2013, the following documents were filed and referred to by this court: E

(a) the application for leave for judicial review dated 6 November 2013 ('encl 1');

(b) statement pursuant to O 53 r 3(2) of the Rules of Court 2012 dated 6 November 2013 ('encl 3'); F

(c) affidavit in support affirmed by Mohd Ilham bin Surif @ Jai on 6 November 2013 ('encl 4');

(d) notice of hearing for judicial review dated 3 April 2014 ('encl 13'); G

(e) SIDREC's affidavit in reply affirmed by Sujatha Sekhar a/p Tan Sri BC Sekhar on 29 January 2014 ('encl 6');

(f) SIDREC's affidavit in reply affirmed by Hong Siew Lai on 29 January 2014 ('encl 7'); H

(g) the applicant's affidavit in reply by Mohd Ilham bin Surif @ Jai on 18 February 2014 ('encl 8');

(h) SIDREC's affidavit in reply affirmed by Hong Siew Lai on 24 February 2014 ('encl 9'); I

(i) the applicant's affidavit in reply by Mohd Ilham bin Surif @ Jai on 11 March 2014 ('encl 12');

(j) SIDREC's affidavit in reply affirmed by Sujatha Sekhar a/p Tan Sri BC Sekhar on 28 January 2014 ('encl 14');

(k) affidavit in reply by Securities Commission ('SC') affirmed by Jas Bir Kaur a/p Lol Singh on 23 September 2014 ('encl 29');

(l) the applicant's affidavit in reply to the Securities Commission by Mohd Ilham bin Surif @ Jai on 10 October 2014 ('encl 34'); and

(m) affidavit in reply by Securities Commission (2) affirmed by Jas Bir Kaur a/p Lol Singh on 29 October 2014 ('encl 36').

PARTIES

[5] For ease of reference the respective parties to these cases are described as follows:

(a) the applicant is a stock broking company. It is a participating organisation defined under the Rules of Bursa Malaysia Securities Bhd ('Bursa'), the Capital Markets and Services Act 2007 ('the CMSA') and Securities Industry Act 1983 (prior to CMSA coming into force). The applicant holds a capital markets services license ('CMSL') issued by the SC;

(b) SIDREC is a body established and approved pursuant to Capital Markets and Services (Dispute Resolution) Regulations 2010 ('the Dispute Resolutions Regulations'). SIDREC is a dispute resolution centre and resolves disputes between investors and capital market intermediaries who were registered as its members; and

(c) SC is established under the Securities Commission Act 1993. It is a self-funding statutory body with investigative and enforcement powers. Amongst of its regulating functions are, regulating all matters relating to securities and derivative contracts, licensing and supervising all licensed persons and ensuring proper conduct of market institution and licensed persons. Its ultimate goal is to ensure that the interest of the public and 'client' within the meaning of Bursa rules are protected at all times.

BACKGROUND FACTS

[6] I will deal with the dispute which arose as a result of the claim made by GCK against the applicant. With respect to the claim by GCK, his position was that he had paid a sum of RM20,425.86 towards the purchase of 10,000 units of Gentings SP shares through one Yew Ting Hong ('YTH'), a remisier and commissioned dealers representative ('CDR') of the applicant. YTH held a capital markets services representative license ('CMSRL') issued by SC.

[7] GCK claimed that his instruction to purchase units of Gentings AP shares was never carried out by YTH. Therefore, GCK claimed against the applicant for the recovery of monies paid by him to the applicant for the

purchase of the said shares. SIDREC found the applicant liable for the loss suffered by GCK. Aggrieved by the said decision, the applicant commenced this judicial review application to move the court by way of a certiorari to quash the said decision ('Decision (1)').

THE GROUNDS RELIED BY THE APPLICANT

[8] The applicant had mounted its challenge against CIDREC's decision based on the following broad grounds:

(a) the M&A had failed to explain to the parties the procedures or manner the mediation and adjudication were to be proceeded with;

(b) the M&A had committed an error of law by referring to only the case of *Saamah Saruan v Norahisham Tahir & Ors* [2010] 1 LNS 1595 in determining the issue of whether YTH, the applicant's remisier, was acting as agent of the applicant; and

(c) the M&A had made an erroneous finding that GCK's authorisation letter did not apply.

THE LAW

[9] In hearing this judicial review application, I reminded myself that this is not an appeal against the decision, action and omission of SIDREC but a judicial review of its decision, action and omission. The governing principle in judicial review is that the review is restricted to the decision-making process, and not the merits, substance or justification of the decision in question. Therefore, it is not the function of this court at this stage to look at the correctness of the decision, action or omission but rather with the way the decision, action and omission was arrived at.

[10] There is also plethora of cases on point, which had delved on the functions of the court in exercising its judicial review powers, some of which had been highlighted to me in the course of hearing these cases. Suffice for me to quote the very often quoted decision of Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 as follows:

> ... This appeal is concerned with and only with judicial review. Judicial review, as my noble and learned friend Lord Brightman stated in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, 'is not an appeal from a decision, but a review of the manner in which the decision was made'.

(See *Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland* [2003] 3 IR 528; *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417; and *Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor* [2009] 6 MLJ 402.)

[11] I have also reminded myself that it is settled law that to qualify as a subject for judicial review, the decision, action and/or omission must have the effect of altering the rights or obligations of the applicant and deprive the applicant of some benefit or advantage (see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374).

[12] I am also mindful of the trite position that I should not venture into disturbing findings of fact made by SIDREC in view of the fact that a judicial review is not an appeal from a decision but rather a review of the decision making process. However, I am also guided by the principles of the Court of Appeal in the case of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) & Anor* [2015] 6 MLJ 77; [2015] 9 CLJ 179 where His Lordship Abu Samah Nordin JCA (as His Lordship than was) in delivering the judgment of the court, held as follows:

> [21] *There is a clear distinction between judicial review and appeal. Appeal is concerned with the merits of the case, in the sense that the appellate court can substitute its own opinion for that of the decision maker.* Appeals lie on fact and law. Such rights of appeal are statutory and the courts possess no inherent appellate jurisdiction. *Review, by contrast, is not concerned with the merits of the decision but with the validity of the decision-making process*: ... The Federal Court in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 had clarified that the decision in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 that *the court could substitute its own view to that of the Industrial Court should only be exercised in the most appropriate of cases*. The same view was expressed in a subsequent decision of the Federal Court in *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629. (Emphasis added.)

[13] The above Court of Appeal case reiterated the principles laid down by the Federal Court in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 and *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 that the High Court is empowered to scrutinise the award for not only the process but also for substance to correct the flawed conclusions.

[14] While mindful of the limits of the judicial review jurisdiction as set out above, in resolving the issues in the case at hand, I have to also examine the overall scheme of the Capital Markets and Services Act 2007 ('the CMSA'), Securities Industry Act 1983 (prior to CMSA coming into force), capital markets services license ('CMSL'), Rules of Bursa Malaysia Securities Bhd and the Capital Markets and Services (Dispute Resolution) Regulations 2010.

[15] Mindful of my role as a judge exercising my judicial review powers, I will focus on the manner the decision, action and/or omission was allegedly made or omitted to do by CIDREC and examine if the decision, action and/or omission was tainted with what Lord Diplock described in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 as 'illegality', 'irrationality' and 'procedural impropriety'.

[16] I have examined the statement of the applicant made pursuant to O 53 r 3(2) of the Rules of Court 2012 and found that the applicant had relied, amongst others, on procedural impropriety and irrationality as the grounds to mount the attack on the decision of CIDREC.

DISCUSSIONS OF THE ISSUES AND DECISIONS OF THE COURT

[17] Having perused the application as well as the affidavits filed herein, having read the written submissions and heard the oral submissions by learned counsels for the applicant, CIDREC and the SC, I had dismissed the applicant's application vide encl 13 with costs of RM15,000 to each respondents. I had given the broad grounds of my decision on the day I delivered my oral judgment and promised to write my written grounds in the event there is an appeal against my decision.

[18] It was the contention of the applicant that the M&A had failed to explain to the parties including the applicant's representatives, the procedures and the manner the mediation and adjudication process was to be proceeded with, in breach of TOR 15.2 of SIDREC's terms of reference ('TOR'). According to the applicant, it was under the impression that the session held on 22 July 2013 initiated by the M&A and in the presence of GCK and the applicant's representatives, was for the amicable settlement of the dispute through the mediation. The applicant contended that based on the exchange of correspondence between the applicant and the M&A, the session before the M&A was merely a fact-finding session with a view of resolving the dispute. In view of this, the applicant claimed that there was procedural impropriety, which merit curial intervention. To support its contention, the applicant relied, amongst others, on pp 36, 45, 65, 114 and 116 of encl 4.

[19] The applicant further contended that as there is a distinction between these two processes. Therefore, the M&A must explain to the respective parties, including the representatives of the applicant, what mediation and adjudication are all about and how the M&A was going to approach the matter, to enable the respective parties to properly prepare and able to put forth their case and/or representations to SIDREC for its consideration.

A SIDREC IN A NUTSHELL

[20] Before I delve with the issue at hand, perhaps it would be apt at this juncture, to introduce briefly about SIDREC and the role it plays in the capital market and services industry.

B

[21] SIDREC is a body set up under the Capital Markets and Services Act (Dispute Resolution) Regulation 2010 ('the Dispute Resolution Regulations'), a subsidiary legislation made pursuant to the Capital Markets and Services Act 2007. It is established in the form of a corporation limited by guarantee and its members comprise of capital markets license holders. The applicant is one of the members of SIDREC.

C

[22] The function of SIDREC is to provide investors with free, fast, convenient and efficient mechanism for dispute resolutions.

D

[23] SIDREC operates within its TOR, approved by SC, (see exh A2 of encl 4) which is binding on members of SIDREC. These TOR provide for, amongst others, the scope, function and jurisdiction of SIDREC. Pursuant to the TOR, SIDREC is empowered to deal with all categories of dispute set out under TOR 5. These disputes will be managed by a person appointed as a case manager, also known as mediator and adjudicator, whose role includes investigating, mediating and adjudicating these disputes, all roles inclusive and within the same process.

E

F

[24] Pursuant to the TOR of SIDREC, SIDREC is empowered to conduct, amongst others, preliminary case review to screen the eligibility of claimant who can bring the dispute before it, eligibility of dispute that can come before it, time frame within which a claim can be brought and decide disputes which fall outside the scope of SIDREC (see TOR 4, 5, 6 and 7 of exh A2 of encl 4).

G

[25] Once SIDREC considers a case satisfies all the requirements of the TOR, it may commence mediation process by adopting the procedure set out in TOR 15 (see exh A2 of encl 4) failing which the dispute will then progress to adjudication where a final decision will be made (see TOR 11 exh A2 of encl 4).

H

[26] The process before SIDREC is rather informal where parties to the disputes are not allowed to be represented by legal representatives. The mediator is given the liberty to determine his/her own procedures without adhering to formalities or technicalities or be bound by rule of evidence. However, in performing the said task, the mediator and adjudicator must ensure compliance with the rule natural justice (see TOR 15 exh A2 encl 4).

I

CHALLENGE ON THE GROUND OF PROCEDURAL IMPROPRIETY

First ground of challenge — procedural impropriety

The M&A had failed to explain to the parties the procedures or manner the mediation and adjudication process was to be proceeded with.

[27] Once challenge is made under this head, the duty of this court is to examine the whole process undertaken by SIDREC to see if SIDREC had breached the provisions of the law or the TOR which would justify this court's intervention by way of judicial review to quash its decision.

[28] It is the contention of the applicant that Decision (1) of SIDREC were flawed on the ground of procedural impropriety as the M&A had failed to explain to the parties, including the representatives of the applicant, the manner in which the M&A was approaching the dispute resolution process.

[29] The whole process adopted by M&A in resolving the dispute between GCK and the applicant could be seen in exh SS9 of encl 9, an affidavit affirmed by Madam Hong Siew Lai who was the M&A entrusted by SIDREC to handle the dispute between GCK and the applicant.

[30] Three senior officers of the applicant were present, namely Mohd Ilham bin Surif @ Jai ('the Head of Operations'), Razahri ('the Head of Compliance') and Kayalan ('the Head of Branch'). GCK appeared on his own behalf. The M&A had noted in the notes of proceedings that she had explained to all parties present, the approach she proposed to deal with the resolution of the dispute between them. Briefly the M&A had informed all parties involved, the following:

(a) the sessions will commence by asking the claimant to explain his concerns and why he had filed the claim against the applicant;

(b) then, the applicant will be given the opportunity to respond and clarify;

(c) if the need arises, there will be break-up sessions for the M&A to speak to parties privately, and thereafter to be followed by a joint session;

(d) all matters said and proposals made during the entire process would be private and confidential, and may not be used in any court proceedings unless required by the law;

(e) if the parties need to talk to the mediator in private or if they need a break, they should inform the mediator and the session can be stopped to allow for the break; and

(f) if mediation fails, then the matter will proceed for adjudication and the adjudicator will make a determination on the matter.

[31] After having explained the procedures to be adopted and what was expected of the parties, they were given the opportunity to seek for clarification should they require further information.

[32] GCK was given the opportunity to state his claim first and he took about one hour to do so. The applicant's representatives were allowed to cross-examine GCK without any restrictions. The applicant's representatives comprised of senior management officers who are seasoned players in the capital market industry, with one of them being a compliance officer of the applicant within the meaning of Securities Commission guidelines for dealers and dealer's representatives (under the Securities Industry Act 1983) who would understand the workings and operations of the applicant and the capital market industry.

[33] The compliance officer must possess, amongst others, either a degree or professional qualification recognised by the Government of Malaysia and a minimum of three years relevant experience in the capital markets or a relevant diploma from an institution recognised by the Government of Malaysia and a minimum of five years relevant experience in capital market. The compliance officer whom the applicant termed as 'lay person' is far more qualified and has the necessary experience to represent the applicant at the dispute resolution session. In fact in terms of representation, the applicant's representation was far more superior than GCK who is only lay man and small investor in the capital market.

[34] From the notes of proceedings, it would appear that the applicant was not in any way handicapped and was able to put up its representation for the M&A's consideration.

[35] There were also separate and joint sessions held to enable parties to fully ventilate each party's case. The M&A had also noted in the notes of proceedings that neither party had proposed an offer for settlement and the dispute could not be resolved amicably. As the M&A could not bring parties to an amicable settlement, the M&A then proceeded with the next process provided by the TOR, the adjudication. This is still within her jurisdiction to do so under the law as she is the investigator, mediator and adjudicator.

[36] A perusal of encl 3 at paras 6 and 7 would show that the applicant had full knowledge and information of the case. This could be seen from the applicant's solicitor's response to GCK's letter, dated 25 April 2013, which was also copied to the applicant.

[37] I have fine-tooth-combed the process undertaken by the M&A as shown in exh SS2 of encl 9, perused all the relevant affidavits filed herein and

cross referred to the process provided in the TOR, I found that the entire process undertaken by the M&A did not suffer from any infirmities which merit curial intervention. In fact the M&A had assiduously followed the steps stipulated by the TOR 15 and had adopted a fair handling of the dispute resolution between the applicant and GCK. There was no denial of the right to be heard in its true sense.

[38] Based on the foregoing, the applicant's first ground of challenge premised on procedural impropriety must fall and be dismissed by this court.

WEDNESBURY UNREASONABLENESS/IRRATIONALITY — ERROR OF LAW

Second ground of challenge — the mediator and adjudicator had committed an error of law by referring to only the case of Saamah Saruan v Norahisham Tahir & Ors [2010] 1 LNS 1595 *in determining the issue of whether YTH, the applicant's remisier, was acting as agent of the applicant; and*

Third ground of challenge — the mediator and adjudicator had made an erroneous finding that GCK's authorisation letter did not apply

[39] Apart from the issue of procedural impropriety, the applicant had also contended that Decision (1) of M&A was tainted with '*Wednesbury* unreasonableness'/irrationality as the M&A had relied on a single case of *Saamah Saruan v Norahisham Tahir & Ors* [2010] 1 LNS 1595 to decide on the principal issue of whether the remisier, YTH, was acting as the agent for the applicant or GCK at the material time.

[40] As the above issues are closely connected, I proposed to deal with these issues in one go, herein.

[41] The definition of term 'irrationality' and or '*Wednesbury* unreasonableness' had been set out by Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service* as 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.

[42] Lord Green in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 stated that the word unreasonableness means, the decision maker must 'exclude from his consideration matters which are irrelevant to what he has to consider; 'there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority'; 'that it is unreasonable in one sense. In another it is taking into consideration extraneous matters'.

[43] The applicant contended that, the M&A as a decision-maker, is bound to consider all relevant cases on the issue of agency. The applicant contended that her act of relying solely on the case of *Saamah Saruan v Norahisham Tahir & Ors* [2010] 1 LNS 1595 in determining the issue of agency and failing to consider any other case law which had clearly established the law on the issue of agency of a remisier vis a vis the client and the stockbroking house, has deprived her of the opportunity to make a considered and reasonable decision, and has severely crippled her ability to apply her mind to the correct questions to be asked in the decision making process.

[44] The applicant contended that the M&A had failed to consider the principle laid down in case of *Teh Seng Cheh v Kuala Lumpur City Securities Sdn Bhd* (Civil Appeal No W-02–1870 of 2009), (unreported) (CA) and *Public Investment Bank Bhd v Yap Chee Hean* [2014] 4 MLJ 857 at p 868. Therefore, this is fatal as the M&A had disregarded two similar cases of high authority which were decided by the Court of Appeal and by the doctrine of stare decisis, binding and applicable on her. If the M&A had considered the principles in these cases, her decision would be in line with *Teh Seng Cheh v Kuala Lumpur City Securities Sdn Bhd.*

[45] In *Teh Seng Cheh v Kuala Lumpur City Securities Sdn Bhd,* the Court of Appeal delved with the issue of legal responsibility of the stock-broking company for acts of its dealer's representative and had considered the claimant's trading account application form with the stock-broking firm, purportedly similar to the case. There was no reference to the standard remisier agreement governing the relationship of the parties in that case. The Court of Appeal held as follows:

> (a) the respondent undertook no responsibility to the appellant for the acts, representations and/or omissions of its dealer's representative;
>
> (b) the stock-broking company merely provides the access to the stock market to clients interested to trade in stocks as shares by providing representatives through whom and through whose account in the stock-broking company the client would trade. Hence, the necessity for approval of the appellant's application to the respondent for the recommendation and undertakings by the dealer's representatives ...; and
>
> (c) in such contractual arrangement the appellant trades through the person who recommended him and who is responsible to the respondent for making good debts incurred and indemnify against loses, it is the client who appoints the dealer's representative to be his agent.

[46] The counter argument of SIDREC and SC was that there was nothing irrational about the M&A's decision to allow GCK's claim against the applicant, especially its decision that the applicant is vicariously liable for the defalcation committed by YTH. This is supported by the following (note: as to

not to lose the effect of the grounds, I had adopted the points as summed up by SIDREC in its written submission herein):

(a) pursuant to the case of *Saamah Saruan v Norahisham Tahir & Ors*, a remisier is both an agent to the client as well as the stock-broking company;

(b) under cl 2.1 of the standard remisier's agreement ('SRA'), YTH had accepted the appointment as the applicant's commissioned dealer's representative and agent of the applicant;

(c) pursuant to cl 5.17 of the SRA, YTH agreed and undertook with the applicant to collect all outstanding sums due from the client, subject to approval from the applicant and ensure that all cheques for payment by the client are made payable to the applicant notwithstanding that the applicant shall be entitled to receive such payments directly from the client;

(d) although the applicant did not give prior approval to YTH to specifically collect payments from GCK, there was implied approval as the applicant was, at all material times, aware of the 'tradition' for dealer's representatives to do so and yet it did nothing to stop this; and

(e) cl 1 of the authorisation letter does not lend support to the applicant's contention that GCK had authorised YTH to submit the confirmation of payment form to the applicant as YTH signed at the column 'requested by' 'remisier/dealing/settlement'.

[47] I am of the view that the M&A was entitled and indeed she was correct in referring to *Saamah Saruan v Norahisham Tahir & Ors*. The M&A had also relied on two other cases, *Francis Joseph Puthucheary v Eng Securities Sdn Bhd & Anor* [2012] 7 MLJ 407; [2011] 1 LNS 732 and *Chien Chung Ming v Kay Hian & Co Pte Ltd & Anor* [1992] 4 CLJ Rep 366 which had laid down the principle on the issue of vicarious liability for defalcation committed by its agent, YTH.

[48] The M&A had taken into consideration all relevant factors which she was bound to follow to decide if YTH was acting as an agent of the applicant (see exh A17 pp 122–124 of encl 4).

[49] Next, this court will have to examine the relevant clauses of the SRA, executed between YTH and the applicant on 20 May 2002, in order to ascertain the true nature of the relationship between these two contracting parties. This SRA was based on the mandatory legal requirement under r 4.8.2(11) of the Rules of the Kuala Lumpur Stock Exchange ('now Bursa Rules').The clauses are as set out below:

(a) cl 2.1:

> In consideration of the promises set out and contained herein, the Company hereby appoints the Remisier and the Remisier hereby accepts the appointment as the Company's Commissioned Dealer's Representative and agent of the Company to:
>
> 2.1.1 deal in securities in the manner stipulated by the Company in the name of the Company and subject to dealing guidelines stipulated by the Company;
>
> 2.1.2 accept and execute orders placed by and/or received from Clients (s) for the purchase and/or sale of securities, upon the terms and the conditions set out herein.

(b) cll 3.1 and 3.2:

> 3.1 The Company shall pay the Remisier a commission in accordance with the Exchange's Member Circular No R/R19 of 1995 (as amended from time to time) out of the brokerage charged to the Client (s) on transactions that are dealt by, or through the Remisier in the name of the Company.
>
> 3.2 The commission shall be paid by the Company to the Remisier after deducting all indebtedness before the end of calender month following the month in which the brokerage to which the commission relates was earned by the Company PROVIDED ALWAYS THAT the Remisier is not in breach of any of the terms of this Agreement.

(c) cl 5.1 which sets out the duties and obligations of the remisier:

> 5.1 The Remisier agrees and undertakes with the Company as follows:
>
> ...
>
> 5.1.4 that he is of good character and will at all times act faithfully for and on behalf of the Company in all his dealings, action, deeds, responsibilities and undertakings;
>
> 5.1.5 that he will observe the highest standards of integrity, professionalism and fair dealings and to act honestly in the client's interest and act faithfully on behalf of the Company in the performance and discharge of his duties in particular, offer accurate information and not make any misleading recommendations to Client (s);
>
> 5.1.6 that he will refrain from doing anything which may directly or indirectly result in the Company, its directors, employees, other Remisiers or his Client (s) contravening or committing a breach of any of those laws, rulings, directives and procedures affecting the business of the Company;

5.1.7 that he will endeavour to collect all outstanding sums due from Client (s) subject to prior approval from the Company and ensure that all cheques for payment by the Client (s) are made payable to the Company notwithstanding that the Company shall be entitled to receive such payments directly from the client;

5.1.8 that he will be engaged full time for the Company and not to be involved in other activities that may deemed to be in conflict with trading securities. The Remisier shall obtain permission from the Company should he wish to absent himself ...

[50] I am of the view that the language in the clauses of the SRA as highlighted above, as a whole unambiguously and unequivocally evidence that the SRA creates an agency relationship between YTH and the applicant.

[51] This agency relationship is essential to SC's role as the regulator in the capital market and services industry with the ultimate aim to protect the investing public for loses arising from defalcated trades by the remisiers. Otherwise the client of the stock-broking company will never be assured of recovering compensation for losses suffered due to defalcation trades by the remisier.

[52] In addition to the above, under the CMSRL license issued to YTH by the SC, a condition was imposed that the remisier cannot act for other participating organisation apart from its principal. This is to make the principal accountable for all acts of the remisier, to ensure the remisier operates in a controlled environment.

[53] Having perused the relevant features of the SRA as highlighted herein which are peculiar and relevant to the factual matrix of the case at hand, I am of the considered view that the applicant's submission that the principles in *Teh Seng Chai v Kuala Lumpur Securities Sdn Bhd* and *Public Investment Bank Bank Berhad v Yap Chee Hean* ought to have been adopted by the M&A cannot be sustained. In *Teh Seng Chai* there was no reference to the standard SRA, which is the main agreement governing the relationship between YTH and the applicant. It is unclear whether the second defendant in *Teh Seng Chai*, the dealer's representative, had similar duties and obligations towards the stock-broking company as YTH had under the SRA. The client in *Teh Seng Chai* had signed an application form with the clause which provided that he would not 'hold the respondent or any of its officers, employees or agents responsible or liable for whatever losses incurred as a result of the acts, representations, and/or omissions of the dealer's representative in carrying out his or her duties in connection with the appellant's trading account' which is not present in this case.

[54] In *Public Investment Bank Bank Bhd v Yap Chee Hean* the relationship was varied vide a private agreement in the form of share trading contract entered into between the stock-broking company and the client. The client made a declaration which read 'I do hereby solemnly declare that the dealing in securities in respect of my trading account are/shall be carried out for me as principal'. The Court of Appeal held that the claimant's letter of authorisation had altered the relationship between the appellant and the remisier which would otherwise be one of principal-agent. Due to this, the Court of Appeal held that the client could be said to treat the remisier as his agent when the remisier was undertaking trades in his account.

[55] In the case at hand GCK did not make any declarations with the effect of treating YTH as his agent. Moreover, the SRA does not contain a clause similar to cl 5.1.20 in *Public Investment Bank Bank Bhd v Yap Chee Hean* as it contains an exception. A perusal of cl 3 of the letter of authorisation would show that GCK was not obliged to indemnify the applicant since the 'loss' was caused by willful act or fraud on the part of the applicant's agent YTH.

[56] On the issue whether the parties can alter the terms and conditions in the SRA, I am satisfied that the SAR is being regulated by SC. Clause 19 of the SRA provides that no amendments and variations could be made to the terms and conditions of the SRA without the written consent of the SC and Bursa.

[57] Therefore, the facts in the case at hand could be distinguished from the two cases relied by the applicant.

[58] Premised on the above reasoning, the M&A had exercised her authority in accordance with the relevant law and provisions of the SRA. Therefore, the decision of SIDREC did not suffer from infirmities of '*Wednesbury*'s unreasonableness' and/or irrationality to merit curial intervention.

[59] For the sake of completeness, I wish to also address on the last point raised by learned counsels for SIDREC and SC pertaining the extent of the court's supervisory powers over matters which fall under the purview of Bursa as well as SIDREC. I am mindful of the public interest elements and the role played by Bursa as a market regulator which has to act in the public interest for the protection of investors in the financial sectors. I have also considered the role and function of SIDREC which was established to provide the retail investors with a cheap, speedy, efficient avenue to address their grievances against the stock-broking companies. I am also guided by the case of *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695; *Kwikasair Industries Ltd v Sydney Stock Exchange Ltd* [1968] ASLC 30 at p 701 where the courts had expressed the views that there ought to be minimal interference with the decisions of the Bursa or similar bodies, so long as these decisions were

made in good faith and did not suffer from infirmities of illegality, irrationality and/or procedural impropriety.

[60] In Case No 25–263–12 of 2013 involving Ng Ai Bee ('NAB'), the issue that was raised was whether NAB had paid cash of RM15,409.21 to YTH as reflected in the fake receipts. NAB contended that due to her long working hours, she had been making cash payments to YTH since she started to trade with YTH. She trusted YTH due to the long outstanding relationship as her remisier with the applicant. She did not expect YTL to issue fake receipts.

[61] Having gone through similar exercise the M&A had made the findings that NAB had proven her case on the balance of probability. However, the M&A found that NAB ought to be more vigilant and ought not to have traded via cash payment. In view of M&A's finding that NAB was negligent she had ordered the sum RM3,852.30 as compensation.

[62] I have perused the relevant cause papers, affidavits and written submissions filed by the respective parties, and found that this judicial review application too is without any merits and based on the same grounds as discussed above, this application ought to be dismissed with costs. All issues decided in Case No 25–230–12 of 2013 will apply *mutatis mutandis* to the case involving NAB.

CONCLUSION

[63] I had taken into considerations all the points that were raised before me by learned counsels for the applicant, SIDREC and SC, both written and oral submissions for both these cases. I had also read and understood the relevant laws applicable to the case at hand which had been highlighted to me by all learned counsels.

[64] Based on the aforesaid and upon a careful consideration of the facts placed before me, I am satisfied on the issues that were presented by SIDREC and SC, the decision of the first respondent did not suffer from serious infirmities of illegality, irrationality and/or procedural impropriety to merit curial intervention. For the above mentioned reasons, I dismiss the prayers sought in terms of encl 13 with costs. After hearing a brief submission on the issue of costs, I have allowed costs of RM15,000 to be awarded to SIDREC and SC in each case.

[65] I take this opportunity to express my gratitude to all learned counsels for their professionalism as well as their commitment in putting across all issues before me and assisted me in coming to this decision.

Applications dismissed with costs of RM15,000.

Reported by Dzulqarnain Ab Fatar